(2)

No. 87-1977

In The

Supreme Court of the United States

October Term, 1988

MARINE BANK OF SPRINGFIELD,
as Special Administrator of the
Estate of PATRICIA WELLER, Deceased,

Petitioner,

vs.

THOMAS HENDRICKSON, SANGAMON COUNTY,
ILLINOIS, DAMON BARLEY, JOHN GREENAN, II,
HARLAND SANDERS, SCOTT ALLIN,
CITY OF SPRINGFIELD, ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS THOMAS HENDRICKSON, SANGAMON COUNTY, ILLINOIS AND DAMON BARLEY, IN OPPOSITION

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THOMAS HENDRICKSON, SANGAMON COUNTY, ILLINOIS, AND DAMON BARLEY respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion and judgment of the Court

of Appeals for the Seventh Circuit entered in this cause on March 21, 1988.

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OPINIONS BELOW

The opinions below are correctly referenced in the body of the Petition and included in the Appendix for the Petition.

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JURISDICTION

The jurisdictional requisites are correctly set forth in the Petition.

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STATUTES INVOLVED

The pertinent sections of all statutes are correctly referenced in the body of the Petition and are contained in the Appendix to the Petition.

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STATEMENT OF THE CASE

Federal jurisdiction for the underlying action is based upon diversity of citizenship under 28 U.S.C.A. § 1332.

A few minutes after 6:00 a.m. on May 8, 1982, the Respondents, Thomas Hendrickson and Damon Barley, were

in route to the Sangamon County Building in Springfield, Illinois. (Deposition of Thomas Hendrickson, record 75, Plaintiff's Exhibit 8e.) While in route to the Sangamon County Building, Respondents Hendrickson and Barley were notified of a chase in progress by an ISPERN radio dispatch. (ISPERN is an acronym for Illinois State Police Emergency Radio Network; Hendrickson deposition, record 75, Plaintiff's Exhibit 8e.) In response to the ISPERN radio dispatch, Respondents Hendrickson and Barley proceeded west on Ash Street to the intersection of Sixth and Ash Streets. (Hendrickson deposition, also see Affidavit of ISPERN Radio Center Manager, Steven K. Miller, attached to Sangamon County's Motion for Summary Judgment, record 36.)

Respondent Hendrickson was driving a "marked" Sangamon County squad car accompanied by his immediate supervisor, Respondent Sergeant Damon Barley. Respondents Hendrickson and Barley were at the intersection of Sixth and Ash Streets when Officer Hendrickson first saw the vehicle the City of Springfield Police Department was pursuing. The pursued vehicle (Defendant Wayne Mudd's vehicle) turned west on Cornell Street before Respondents Hendrickson and Barley entered the pursuit. Respondents Hendrickson and Barley pursued the Mudd vehicle from Sixth and Cornell, westbound to Fourth Street. The Respondents, Hendrickson and Barley, continued the pursuit north on Fourth Street until approximately Ash Street where Respondents Hendrickson and Barley terminated the chase after they had lost the suspect's vehicle. (Hendrickson police report attached to Motion for Summary Judgment, record 36.)

The Respondents proceeded west on Laurel Street in an attempt to locate the Mudd vehicle. When the Respondents' vehicle reached the railroad tracks located at Third and Laurel Streets, they noticed smoke in the area of Spring and Laurel Streets. The Respondents proceeded to the intersection of Spring and Laurel where they apprehended Defendant Wayne Mudd after the Mudd vehicle collided with the vehicle driven by the Petitioner's decedent, Patricia Weller. The Respondents' participation in the pursuit lasted only approximately three blocks. (Hendrickson deposition, record 75, Plaintiff's Exhibit 8e.)

On February 26, 1987, the Court granted the Motion for Summary Judgment of all the Respondents without hearing, pursuant to an Opinion Order of that date.

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REASONS FOR NOT GRANTING THE WRIT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BASED UPON A FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT WAS PRESENT REGARDING THE OFFICERS' ALLEGED BREACH OF THE APPROPRIATE STANDARD OF CARE.

A. The Erie doctrine is inapplicable.

The Petitioner states that the issue before the Court was whether Respondents negligently engaged in high risk pursuit of a person suspected of criminal theft. Pet. Brief, p.5. When the Court of Appeals held in favor of Respondents, Petitioner alleged an Erie doctrine violation because

of the Court's refusal to follow "controlling Illinois precedent."

It is well established that the main thrust of *Erie v. Tompkins* was to avoid conflict between federal and state courts. 304 U.S. 64 (1938). Through a long line of decisions, the 1938 *Erie* decision has been substantially modified to properly weigh federal and state interests in regard to procedure. The most recent modification was accomplished in *Hanna v. Plumer,* 380 U.S. 640 (1965).

To determine whether a particular federal practice is applicable, *Hanna* suggests a three part analysis. The first inquiry determines whether a federal rule actually governs the practice under consideration in the particular case. If so determined, the court must further establish whether the federal rule conflicts with state law. Such a conflict exists if the state law is more narrow than the federal rule. If so, then the court must further determine whether the latter is a valid exercise of the power granted to the Supreme Court under the Rules Enabling Act. The federal rule will be controlling if it covers the specific matter in question and is a valid exercise of power delegated to the Supreme Court by Congress under Articles I and III of the United States Constitution.

In the present case, the Petitioner has not alleged any such conflict between federal and state courts. The claim is simply that the federal court did not follow controlling Illinois precedent. Thus, there is no procedural conflict. But assuming, *arguendo,* that the claim is proper, the Petitioner presents no binding authority, only authority easily distinguishable from the present case. *Arm-*

strong v. Mudd, 655 F. Supp. 853, 858-860 (C.Dist. Ill. 1987). Further, Petitioner ignores the persuasive authority of *Breck v. Cortez,* 141 Ill. App. 3d 351, 490 N.E.2d 88 (2d Dist. 1986), where the Court of Appeals granted summary judgment in a high speed chase case because the plaintiff failed to establish willful or wanton negligence.

The court merely weighed the evidence and even though viewed in a light most favorable to the nonmoving party, found in favor of Respondents on Motion for Summary Judgment. Under these circumstances, the *Erie* doctrine is clearly inapplicable.

B. Summary Judgment was the proper remedy.

The Petitioner states:

> "The proper use of summary judgment has been repeatedly approved by this court where no genuine issue of material fact exists, however, it has never authorized a predetermination of disputed facts."

Although this is a correct summary of the law, the allegation that such a predetermination exists in this case is unfounded. Rule 56(a) clearly demonstrates that where a material fact does not exist the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (1986). To determine whether a material fact exists, the evidence must be viewed in a light most favorable to the nonmoving party, in this case the Petitioner. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158-59 (1970). However, where an alleged material fact is immaterial, minor, or illusory it will not be sufficient to thwart an otherwise proper summary judgment. *Anderson v. Liberty Lobby & Co.,* 106 S. Ct. 2505, 2510 (1986); *Federal Deposit In-*

surance Corp. v. Meyer, 781 F.2d 1260, 1267 (7th Cir. 1986). *Anderson* maintained that "it is clear . . . that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth but determine whether there is a genuine issue for trial." *Id.* Thus, the determination as to whether a material fact exists is within the discretionary power of the judge. The Court of Appeals then must determine whether the district court judge has abused that discretion with which he has been empowered.

The district court plainly did not abuse its discretion. Although a determination of a breach of duty is ordinarily a question of fact for the jury, this is not a universal rule. *Jardine v. Rubloff,* 73 Ill. 2d 31, 43, 382 N.E.2d 232, 237 (1978). If all the evidence viewed in an aspect most favorable to the opponent so overwhelmingly favors the movant that no genuine issue of material fact exists, summary judgment is appropriate. *Breck,* 141 Ill. App. 3d at 351, 490 N.E.2d at 88. The Petitioner maintains that a factual issue arises from the deposition of Ken Katsaris, (Petitioner's expert), who stated that the Respondents violated departmental policy in pursuing a suspect accused only of theft through an urban area. However, the court correctly interpreted the regulations of the Sangamon County Sheriff's office as being quite general in referring only to the use of due care in the line of duty. Operating Vehicles Under Emergency Conditions, Sangamon County Sheriff's Office Rules and Regulations, R. 72, 11.11 & 11.12. Further, the Illinois Vehicle Code exempts drivers of authorized emergency vehicles from the speed limit and certain rules of the road. Ill. Rev. Stat., Chap. 95½,

§ 11-205 (1983 & Supp. 1987). This alone does not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard to the safety of all persons, nor do such safety provisions protect the driver from the consequences of his reckless disregard for the safety of others. *Id.* However, the court viewed the public policy reflected in Ill. Rev. Stat., Chap. 95½, § 11-205 as "recognizing the need for prompt apprehension of suspected law violators." *Armstrong,* 65 F.Supp. at 858. Given the general nature of the Petitioner's arguments, the court properly concluded that no jury could find in favor of Petitioner.

The Petitioner also asserts that the mere pursuit of a criminal through city streets on suspicion of theft is negligence *per se,* where the police officer possesses a description of the culprit and the vehicle's license number. However, the Petitioner fails to mention that city officers had, at the time of the accident, given up chase and county officers, slowed because of heavy traffic, had lost sight of the suspect. The court concluded as a matter of law that the Petitioner failed to meet her substantive evidentiary burden with regard to the patrolman's conduct and furthermore, that the duty of the police was to suppress and apprehend the offender.

Although Petitioner chastises the lower court for using out of state authority to substantiate its opinion, the case relied on by Petitioner in opposition is easily distinguishable. *Armstrong,* 655 F.Supp. at 858-859, n.10. In addition, that the present case does not fall into the realm of negligence *per se* is substantiated by *Breck.* In that case, Bollingbrook police officers, defendants, and their em-

ployers moved for summary judgment which was granted by the circuit court. 141 Ill. App. 3d at 359, 490 N.E.2d at 95. The appellate court affirmed the motion for summary judgment stating that the evidence was not sufficient to find the municipal police officers engaged in a high speed chase were guilty of willful or wanton negligence resulting in a collision between the suspect vehicle and another vehicle on the highway. The appellate court closed its decision with a quote from *Stanton v. State,* 26 N.Y.2d 990, 259 N.E.2d 494 (1970), which states as follows:

> "While it is most unfortunate that bystanders are sometimes innocently involved and injured by the police in the performance of their duties, such emotional and understandable human considerations are not a substitute for proof of negligence."

Accordingly, and for all the reasons stated above, the Court of Appeals properly affirmed the District Court's approval of summary judgment.

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CONCLUSION

The Seventh Circuit Court of Appeals' decision does not conflict with substantive state law in tort action based on diversity of citizenship. The Seventh Circuit's holding did not deny the Petitioner the right of a civil trial by jury guaranteed under the Seventh Amendment to the United States Constitution.

For all the foregoing reasons, Respondents urge that the Petition for a Writ of Certiorari, advanced by the Petitioner in this cause, be denied.

Respectfully submitted,

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